affirmed by the Minnesota Court of Appeals on June 8, 2004. Subsequently, the Minnesota Supreme Court denied discretionary review, and this Court denied by writ of certiorari.

He then discovered that the lawyers who prosecuted him were not appointed as public prosecutors by the board of county commissioners of the county where the cause was venued, as allowed by Section 388.09 of Minnesota Statutes, or by the county attorney with the consent of the board of county commissioners as allowed by Section 388.10, or by the district court on motion duly made as allowed by Section 388.12 of Minnesota Statutes, nor were the lawyers acting in behalf of the attorney general on request of the county attorney or the governor as allowed by Section 8.01 of Minnesota Statutes.

On this basis, he sued for post-conviction civil relief under Section 590.01 of Minnesota Statutes.

Judicial decisions impose certain implied conditions on the appointment of any lawyer to assist or act in lieu of the county attorney without his consent. See, e. g., *Keiver v. Koochiching County*, 158 N. W. 102 (Minn. 1918). But the mischief here claimed is not breach of any such implied condition. In seeking post-conviction civil relief, your petitioner claimed that the lawyers prosecuting him posed as public prosecutors under *no existing statute or provision of law*, and that, therefore, the prosecution against him was null and void under the established law of the State. See, e. g., *State ex rel. Wild v. Otis*, 257 N. W. 2d 361 (Minn. 1977).

The State of Minnesota answered the petition for post-conviction civil relief in the state district court by interposing two defenses:

-- First, it was pleaded that the lawyers prosecuting your petitioner were appointed as public prosecutors pursuant to a certain "project safety" agreement, January 28, 2000 (Appendix VII-B hereof). It was claimed by the State of Minnesota that this agreement was a joint powers agreement

adopted by the governing bodies of different units of local government as authorized by Section 471.59 of Minnesota Statutes. Aside from the question whether a joint powers agreement might authorize some unique method of appointing public prosecutors not otherwise provided for by law, this particular agreement did not include such purported authorization and was not between governing bodies of different units of local government, and so was not a joint powers agreement authorized by Section 471.59 of Minnesota Statutes. During proceedings before the Minnesota Court of Appeals, it became evident that the said "project safety" agreement would not help the State of Minnesota, which then pleaded for the first time a certain joint powers agreement of April 9, 1970, the same set out in full on Appendix V hereof. Aside from the fact that this agreement was pleaded for the first time on appeal, contrary to *Thiele v. Stich*, 488 N. W. 2d 580 (Minn. 1988), the lawyers prosecuting your petitioner were not appointed as prescribed by article 7 of the said joint powers agreement, Appendix V hereof. Hence it was clear beyond doubt on the face of the record that your petitioner was prosecuted by lawyers who were not lawfully appointed as public prosecutors where the cause was venued.

-- The answer of the State of Minnesota in the state district court also pleaded the doctrine of *State v. Knaffla*, 243 N. W. 2d 737 at 741 (Minn. 1976), which says that a criminal defendant generally may not raise a point for the first time on a petition for post-conviction civil relief, if he could have raised it in the original prosecution in the trial court and/or on appeal from the conviction, but failed to do so. To this doctrine, there are only certain narrow exceptions. See, e. g., *Boitnott v. State*, 631 N. W. 2d 362 at 369-370 (Minn. 2001). And the existence and applicability of such exceptions became the main subject of controversy before the Minnesota Court of Appeals.

The principal exception on which your petitioner relied before the Minnesota Court of Appeals was that a criminal

defendant may raise a point for the first time on petition for post-conviction civil relief, if the point belongs to a limited class of defenses which, under state law, are absolute and cannot be waived. See, e. g., *State v. Johnson*, 653 N. W. 2d 646 at 650-651 (Minn. App. 2002). In other words, your petitioner claimed the established law of the State to be that, if a someone is criminally charged by lawyers not lawfully appointed or authorized to act as public prosecutors, the accused has an absolute defense which cannot be waived; that any resulting conviction is void; and that such may be vacated at any time on any motion or application for any suitable writ or order.

The appellate record in Minnesota shows what happened in relation to this contention:

The cause was fully briefed and orally argued on appeal. As appears in Appendix IV hereof, the Minnesota Court of Appeals said,

> "Appellant also contends that the issuance of a complaint by a county attorney who was not properly appointed is a jurisdictional defect that cannot be waived and is thus not barred by *Knaffla*. But the supreme court has concluded that this is no more than a technical defect that can be waived by the failure to raise the issue in the trial court. *State v. Abbott*, 356 N. W. 2d 677 at 679 (Minn. 1984). Appellant was prosecuted by attorneys acting on behalf of the prosecutorial authority for the jurisdiction where the crime occurred. Therefore, there was no jurisdictional defect. Cf. *State v. Persons*, 528 N. W. 2d 278 at 280 (Minn. App. 1995)."

But in *State v. Abbott*, 356 N. W. 2d at 678, it was said by the Minnesota Supreme Court,

"Defendant argues first that he was denied due

> process because the attorney who prosecuted him was not properly appointed as assistant county attorney. Defendant apparently did not raise the issue in the trial court. He has not cited any authority that would require vacation of his conviction on that basis. We hold that, even if the prosecutor's appointment was technically defective, the defect did not prejudice defendant or deprive him of a fair trial. *Wingfield v. State*, 205 P. 2d 320 (Okla. Cr. 1949), overruled on other grounds, *Homer v. State*, 657 P. 2d 172 (Okla. Cr. App. 1983)."

In *Abbott*, therefore, the Minnesota Supreme Court did not "conclude" that unlawful appointment of a lawyer as a public prosecutor is a "mere technical defect that can be waived," but avoided the question for want of proper argument and authority cited in behalf of the appellant, and held that prejudice must in any event be shown as a condition of standing. The uncontested pleadings show that your petitioner was prejudiced by criminal prosecution brought by lawyers who were never lawfully appointed as public prosecutors, as appears in paragraph 14 of the petition for post-conviction civil relief, Appendix VIII hereof, to which no denial appears in the State's answer, Appendix VII hereof. In substance, it was admitted on this record that, if your petitioner had been prosecuted by the county attorney in the county of venue or one of his regular assistants following already established policy of that office, he would have had the opportunity to plead guilty to a gross misdemeanor, pay back taxes, and return to work. Yet because he was prosecuted by lawyers from another county with a special agenda of their own, he was offered no such opportunity to enter a compromise plea and was forced to defend against charges of felony on which he was convicted albeit on dubious grounds. And in consequence of his felony conviction, he lost his employment as a commercial airline

pilot, and his position as a colonel in the air force reserve was injured. Hence, standing was not an issue here. Your petitioner is fighting to regain his livelihood so he may support his family.

More interesting, however, the Minnesota Court of Appeals cited and acknowledged *State v. Persons*, 528 N. W. 2d at 280, where the Minnesota Court of Appeals held,

> "A prosecutor *may not legally act beyond the authority* conferred by the legislature on his or her office. *State v. House*, 192 N. W. 2d 93 at 95 (Minn. 1971). The prosecution here was initiated by the wrong prosecuting authority. Because the prosecutor for St. Joseph lacked authority to prosecute, the attempt to prosecute Persons *became a nullity*. Because the wrong prosecuting authority signed the complaint, we conclude that there is a violation of statutory authority *which the defendant cannot waive*." [Emphasis added]

It should be added further that the authority of *State v. Persons*, 528 N. W. 2d at 280, rests squarely and securely on the authority of the Minnesota Supreme Court in *State v. House*, 192 N. W. 2d at 95, which also speaks in language impossible to misunderstand:

> "That statute says that the county attorney shall represent the county in all cases in which the county is a party, advise county officers, and handle all criminal matters within the county. No authority is given for the county attorney to deal with civil cases in which the State, rather than the county, is a party. The attorney general . . . is empowered to act as the attorney for all state officers, boards, and commissions and that includes the department of public safety. When requested by the attorney general, the county

> attorney shall act in behalf of such officials . . . But no request was made here, and, consequently, *no authority* was given to the county attorney to drop the implied-consent charge in behalf of the department of public safety . . . We accordingly hold that the county attorney acted *beyond his authority* in attempting to bargain for dismissal of these proceedings . . . The order is accordingly reversed" etc. [Emphasis added]

And the court-written syllabus in *House*, 192 N. W. 2d at 94, removes any doubt about the contours of the established law of Minnesota:

> "Without express authorization, the county attorney *does not have the authority* to act in behalf of the commissioner of public safety in such proceedings, and any agreement by the county attorney to waive to dismiss such proceedings is *without force and effect*." [Emphasis added]

There are other judicial opinions, emphasizing the same clear principle of law in Minnesota. See *State v. Borgstrom*, 72 N. W. 2d 799 at 800 (Minn. 1897); *State ex rel. Wild v. Otis*, 257 N. W. 2d at 364; and *State ex rel. Graham v. Klumpp*, 523 N. W. 2d 8 (Minn. App. 1994), rev'd. on other grounds 536 N. W. 2d 313 (Minn. 1995).

When the Minnesota Court of Appeals failed to give him the benefit of the established law of his State, your petitioner could not petition for rehearing or reconsideration, and so sought discretionary review by the Minnesota Supreme Court, and laid out the unmistakable precedents and cavalier refusal of the Minnesota Court of Appeals to apply them in his cause, as appears under "why review should be granted" in Appendix III hereof. The State made no attempt to controvert the facts on this record, or the meaning of *Persons* which the Minnesota Court of Appeals cited but refused to apply to your petitioner, and *House* on which *Persons* relied, nor, as appears in

Appendix II hereof, did the State claim that *Persons, House,* and other supporting authorities were incorrectly decided or should be overruled. On this record, the Minnesota Supreme Court denied review to correct this manifest error.

**Why a Writ of Certiorari Should Be Granted**

A striking characteristic of this case is that, *on the merits*, it turns entirely on the law of Minnesota. How then can this matter, arising under the 14th Amendment, fall within the jurisdiction of this Court as the highest judicial body of the United States? It is *precisely this feature* which, ironically, raises *in the particular setting of this case* a simple and all-important question of *Federal constitutional law*.

It is conceded that, if the legislature of Minnesota had provided, or if the judiciary of the State had decided that want of proper appointment or authority of a lawyer to act as a public prosecutor is a technical deficiency only, can be waived, and may be cured retroactively nunc pro tunc, the law of the State would not offend any provision of the United States Constitution. And in such case, your petitioner would have no grievance here.

But the legislature of Minnesota has provided otherwise, and the judiciary of the State has confirmed that, unless a lawyer is properly appointed to act as a public prosecutor where cause is venued, the accusation is a nullity, any conviction upon it is void, and the cause raises an absolute defense which may not be waived, nor is the accused barred from attacking the judgment against him at any time by any available writ, suit, motion, or process before any court of competent jurisdiction. *The most fundamental principle* of criminal due process guaranteed by the 14th Amendment is not that the accused is entitled to notice and hearing on specific charges in writing, or that he may refuse to give evidence against himself, or that he may have the assistance of counsel, or that he may confront his accusers, or that he is entitled to trial by jury, etc. Important as such privileges and

immunities are, there is a guarantee even more rudimentary. *For due process of law always means at a minimum that the accused shall enjoy the benefit of the law as already established and still operative.* And this most elementary of all basic rights is guaranteed by the due process clause of the 14th Amendment.

An indispensable principle of Federal constitutional law imposed on every State of the Union was this timelessly restated by Justice Hugo Black in *Duncan v. Louisiana*, 391 U.S. 145 at 169 (1968):

> "The origin of the Due Process Clause [of the 14th Amendment] is Chapter 39 of Magna Carta [granted by King John at Runnymede, 1215 A. D.] which declares that 'No freeman shall be taken, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land*.' (Emphasis added.) As early as 1354 the words "due process of law" were used in an English statute interpreting Magna Carta [28 Edward III, Chapter 3], and by the end of the 14th century 'due process of law' and 'law of the land' were interchangeable. Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the laws of the land that already existed at the time the alleged offence was committed. This means that the Due Process Clause gives all Americans, whoever they are, and

> wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws."

What Justice Black said here does not necessarily mean, as he believed, that the 14th Amendment incorporates the whole Federal Bill of Rights and applies it to the several States. That is another question, very large, which need not be addressed here. But *at least* it means, beyond doubt, that an accused prosecuted before the courts of one on the several States is entitled to *the benefit of the established law* of such State, whatever is may be, once clearly settled, nor *in constitutional principle* may he be denied it while others have enjoyed the benefit thereof, -- not unless, as has not occurred in this case, the relevant statutes have been amended or repealed, or earlier precedents have been modified or overruled upon due consideration.

Merely because the merits of a cause turn exclusively upon the law of a State of the Union, it does not follow that this Court has no jurisdiction to review the judgment. Diversity cases under *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938), are a well-understood illustration of this truth.

And although wide latitude is conceded to the judiciary of every State to determine what state statutory or constitutional provisions mean in the eyes of the law, the courts of a State must in any event act upon independent state grounds in construing such statutory and constitutional provisions in order to claim exclusive rights under the 10th Amendment. For the United States Constitution imposes certain distinctive limitations upon state tribunals in the way they read and apply state law. See, e. g., *South Dakota v. Neville*, 459 U. S. 553 (1983). Cf. *State v. Neville*, 332 N. W. 2d 723 (S. D. 1981), and 346 N. W. 2d 425 (S. D. 1984).

As the judiciary of a State must act upon independent state grounds when interpreting state statutory and constitutional provisions in order to claim prerogatives reserved under the 10th Amendment, so too the courts of a State must give those accused in criminal prosecutions *the benefit of the established law* of the State in order to avoid collision with the *due process clause of the 14th Amendment.*

The case most nearly on point is *Hicks v. Oklahoma*, 447 U. S. 343 (1980), wherein a certain criminal defendant was sentenced under a statute which the state court of appeals had found unconstitutional in another case, nor was it claimed or held that the state court of appeals was in error in the earlier case. On that basis, this Court held that the criminal defendant had been denied due process of law as guaranteed by the 14th Amendment.

For giving a citizen the benefit of the established law, whatever it may be, is the true meaning of the rule of law, without which civilization cannot flourish. The rule of law, properly understood, presupposes that the law is an *objective truth which is independent of judicial mind and must be discovered and not created.* And this objective truth consists of legislative or sovereign will ascertained according to certain rules of construction and such historical evidence as those rules contemplate, or acknowledged legal custom and enduring legal tradition, of which in either case judicial precedent is the best evidence, even if not the substance. Cf. Jay Cooke (ed.), *Reports of Alexander Hamilton*, Harper & Row, New York, 1964, pp. 64-65 (from his Opinion on the Bank, February 23, 1791, discussing the proper way to ascertain the "intention of the framers"); and Sir William Blackstone, *Commentaries on the Laws of England*, Edward Christian, London, 1765, Bk. I., pp.59-61 (on the "fairest and most rational method to interpret the will of the legislator"), and pp. 69-72 (on the "established rule to abide by former precedents where the same points come up again in litigation").

In the spirited debate over the meaning of judicial precedent in *Planned Parenthood v. Casey*, 505 U. S. 333 (1992), there were different views on precisely what conditions must exist before an earlier decision may be overruled or modified. But no member of this Court suggested that, under a civilized system of due process, a tribunal may in a particular case depart *for no reason at all* from unambiguous holdings of high courts, and thus render a judgment against an individual contrary to the established law. Yet that is precisely what happened in this case, which is obviously prohibited by the due process clause of the 14th Amendment.

In *Planned Parenthood*, the opinion of the court reaffirmed the substance of *Roe v. Wade*, 410 U. S. 113 (1973), but with express modifications. Due process of law contemplates application of stare decisis. And it is part of stare decisis that a decided case generates a precedent which is the best evidence of the law, and that such a precedent stands unless and until expressly overruled or modified for good cause. Cf. *Anastasoff v. United States*, 223 F. 3d 898 (8 Cir. 2000). This practice, needless to say, is regularly observed in the appellate courts of Minnesota. See, e. g., *State v. Rud*, 359 N. W. 2d 573 at 579 (Minn. 1984), modifying *State v. Florence*, 239 N. W. 2d 892 (Minn. 1976).

The Petition of Right (3 Charles I, Chapter 3, enacted in 1628) finally settled that no tax of any shape or kind, levied on whatever name or pretext, could ever be imposed without consent of Parliament. An objective and unmistakable principle of fundamental law was thereby established in England. When nevertheless certain of the King's judges willfully deprived a loyal subject of the benefit of this indispensable principle in *The King v. Hampden*, 3 Howell's St. Tr. 825 (Exch. Ch. 1637), the House of Commons returned bills of impeachments on which the wayward judges were held to account before the House of Lords, as appears in the *Case of Sir Robert Berkeley*, 3 Howell's St. Tr. 1283 (H. L. 1641).

Benjamin Cardozo drew upon such legal tradition when he said,

> "Judges have, of course, the power, though not the right to ignore the mandates of a statute, and render judgment in spite of it. They have the power, though not the right to travel beyond the walls of the interstices, the bounds set to innovation by precedent and custom. None the less, by that abuse of power, they violate the law. If they violate it willfully, i. e., with guilty and evil mind, they commit a legal wrong, and may be removed and punished even though the judgments which they have rendered stand." -- *The Nature of the Judicial Process*, Yale University Press, New Haven, 1921, p. 129

If a judge can be impeached for willfully giving a false judgment, the due process clause of the 14th Amendment guarantees to the accused in a criminal case the *benefit of the established law* of the State in which the prosecution is brought.

The gravity of denying anyone the benefit of the law is illustrated in the tragic case of *Scott v. Sandford*, 19 Howard 391 (U. S. 1857), which, like the lingering memory of a nightmare, continues to haunt the conscience of this Court. It is known only by a few that Dred Scott and his family had actually been granted their freedom by a Southern judge presiding over a state circuit court in Missouri on the basis of a large and noble body of Southern jurisprudence, including many decisions of the Missouri Supreme Court. And this corpus could in turn be traced to the judgment of Lord Mansfield in *Sommersett's Case*, 20 Howell's St. Tr. 1 at 80-82 (K. B. 1771), and even older cases such as *Pigg v. Caley*, Noy 27 (K. B. 1618).

Yet, a majority of the Missouri Supreme Court defied its own precedents without expressly citing and overruling them,

then reversed the state circuit court and remanded a freedman, his wife, and his daughters back to slavery. For the benefit of history, this judicial wrong was memorialized in powerful dissents of great judges. See Gamble, C. J., in *Scott v. Emerson,* 15 Mo. 576 at 587-592 (1852), and Curtis, J., in *Scott v. Sandford,* 19 Howard at 601-604. And failure of this Court to oblige Missouri to give her own people the benefit of her own established law had awesome consequences for the whole Union. Was not the due process clause of the 14th Amendment intended to cure and deter such calamity?

The type of injustice inflicted upon your petitioner by the Minnesota Court of Appeals in this case may be more common than lawyers proud of their profession would like to admit. But this case rests upon a particularly acute record which provides a unique opportunity for this Court to promote good judicial performance across the United States by announcing explicitly in a formal holding, expanding upon *Hicks v. Oklahoma,* 447 U. S., that denial of the benefit of established law to a criminal defendant by courts of a State will bring the due process clause of the 14th Amendment into play, if such law has been unambiguously formulated by competent authority, remains in effect without alteration, and is unmistakable on the record.

An *enlightened Federalism* will concede to the several States broad discretion in establishing their respective laws and customs, so each may develop a distinctive civilization and personality. Yet the Union may and must firmly insist that each State at least give all the benefit of her own established law as a prerequisite of such legal independence.

Such a holding will not open Pandora's box, because it will be applicable only in a certain few cases in which state law has been pronounced with clarity, plainly laid out on the record, and state courts have overtly disregarded the law which they themselves have pronounced.

## CONCLUSION

**WHEREFORE,** your petitioner respectfully prays for a writ of certiorari to the Minnesota Court of Appeals that lawlessness and injustice may be corrected.

Dated: November 10, 2005 Respectfully submitted,

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NOTE: Mr. Graham and Mr. Jensen were respectively admitted to the Bar of the Supreme Court of the United States on August 5, 1971, and January 20, 1987. Application for admission of Mr. Olson to the Bar of the Supreme Court of the United States is pending.

STATE OF MINNESOTA
IN SUPREME COURT

A04-2157

Rodney Alan Mattmiller,

Petitioner,

vs.

State of Minnesota,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Rodney A. Mattmiller for further review be, and the same is, denied.

Dated: August 16, 2005

BY THE COURT:

s/_____

Kathleen A. Blatz
Chief Justice

Office of the Hennepin County Attorney
Amy Klobuchar County Attorney

LETTER RESPONSE TO PETITION FOR REVIEW
July 12, 2005

Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Dr Martin Luther King Blvd
St. Paul, MN 55155-6102

Re: Rodney Alan Mattmiller vs. State of Minnesota
Court of Appeals File No. A04-2157

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

We received Appellant's Petition for Review in the above matter. Pursuant to Minn. R. Crim. P. 29.04, Subd. 5, we have decided not to respond. We understand that in accordance with the above rule, our lack of response does not indicate agreement with the Petition for Review.

We agree with the Court of Appeals' analysis and rely upon its decision. We oppose the Petition and will respond if this Court so orders.

Respectfully submitted,

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AMY KLOBUCHAR
Hennepin County Attorney

s/_____

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ATTORNEYS FOR RESPONDENT

**A04-2157**
**STATE OF MINNESOTA**
**IN THE SUPREME COURT**

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Rodney Alan Mattmiller,

Petitioner,

vs.

State of Minnesota,

Respondent.

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**PETITION FOR REVIEW**

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Counsel for
the State of Minnesota

**MAY IT PLEASE THE COURT:**

This petition is brought pursuant to Rule 29.04 of the Minnesota Rules of Criminal Procedure for review of the judgment of the Minnesota Court of Appeals, per Hon. Gary Crippen, Judge, the same entered on June 14, 2005, affirming the final order of the Washington County District Court, per Hon. Gregory Galler, Judge, dismissing a petition for post-conviction civil relief brought under Chapter 590 of Minnesota Statutes, and denying a motion to strike certain portions of the respondent's argument and appendix on appeal. The criminal rules are applicable in cases of post-conviction civil relief as held by the Minnesota Court of Appeals in this cause. See the petitioner's appendix, pages A30-A31.

## LEGAL ISSUES

**1. Whether, in the State of Minnesota, a criminal conviction secured by lawyers not lawfully appointed as public prosecutors is null and void.**

Without hearing requested or close examination, the district court held that the lawyers prosecuting were lawfully appointed, and so did not reach this question.

On appeal it became clear that the lawyers prosecuting were not lawfully appointed, but the court of appeals held that the defense had been waived, thus also avoiding the question. Even so, in its analysis the court of appeals cited and relied upon *State v. Persons*, 528 N. W. 2d 278 at 280 (Minn. App. 1995), in which it was **expressly held** that a criminal prosecution by lawyers not properly appointed is null and void.

**2. Whether, in a criminal case, unlawful appointment of lawyers acting for the State is a defense which cannot be waived.**

The district court assumed that the defense can be waived.

The court of appeals held that the defense can be waived, while citing and relying upon *State v. Persons*, 528 N. W. 2d at 280, in which it was **expressly held** that the defense cannot be waived.

**3. Whether, in a criminal case, a defense which cannot be waived may be raised for the first time in proceedings for post-conviction civil relief.**

The district court did not reach this question.

But the court of appeals evidently assumed the affirmative in keeping with *State v. Johnson*, 653 N. W. 2d 646 at 650-651 (Minn. App. 2002), and *State v. White*, 219 N. W. 2d 89 at 93 (Minn. 1974).

## PROCEDURAL HISTORY

On September 2, 2004, the petition for post-conviction civil relief was filed. The petitioner claimed that he had been prosecuted in a criminal case by lawyers not lawfully appointed to represent the State, and that he had been substantially prejudiced. See pages A2-A7 of the petitioner's appendix.

On September 27, 2004, an answer was filed by the State on September 27, 2004. The answer pleaded two defenses, viz., that the lawyers prosecuting had been lawfully appointed under a certain "project safety" agreement concluded on January 28, 2000, and that the petitioner could not raise this question for the first time in proceedings for

post-conviction civil relief. See pages A8-A16 of the petitioner's appendix.

On October 6, 2004, the district court, rejected the petitioner's request for hearing, and dismissed the petition on the face of the pleadings. See pages A17-A18 of the petitioner's appendix. From the final order of the district court, the petitioner appealed.

On January 31, 2005, the State pleaded for the first time on appeal that the lawyers prosecuting the petitioner had been lawfully appointed under a certain joint powers agreement of April 9, 1970. See pages A19-A26 of the petitioner's appendix.

On February 9, 2005, the petitioner filed a motion to strike the State's submission, on grounds of lateness, and pleading new material for the first time on appeal. See pages A27-A29 of the petitioner's appendix.

On March 14, 2005, the court of appeals, by interim order, denied the petitioner's motion to strike on grounds of lateness, but referred the question of pleading new material for the first time on appeal to the hearing panel. See pages A30-A31 of the petitioner's appendix.

On June 14, 2005, the court of appeals, by unpublished opinion, affirmed the final order of the district court on grounds that the defense of unlawful appointment had been waived and could not be raised for the first time in post-conviction civil relief, then denied the motion to strike new material pleaded for the first time on appeal. See pages A32-A36 of the petitioner's appendix.

## STATEMENT OF THE FACTS

As should be clear from the procedural history, all operative facts, are settled on the face of the pleadings and

motions.

Your petitioner brought a petition for post-conviction civil relief to overturn his conviction for failure to pay certain taxes to the State, on which the Minnesota Court of Appeals affirmed in an unpublished opinion on June 8, 2004, in State of Minnesota v. Rodney Alan Mattmiller, No. A03-472, following which this Court declined review on August 19, 2004.

Your petitioner continues to protest his innocence based on the preemptive effect of 49 United States Code, Section 40116, as applied in *Aloha Airlines v. Director of Taxation,* 464 U. S. 7 (1983). Nevertheless, the petitioner concedes that the preemptive effect of Section 40116 cannot be raised here.

The petitioner complains, and the State has never denied that he was originally prosecuted in Washington County, where the cause was properly venued, by Carolyn Lennon and Peter Connors, who held themselves out and posed as special assistant county attorneys in and for Washington County; yet, as is established without controversy on this record, neither Mme. Lennon nor Mr. Connors was properly appointed by the county board under Section 388.09 of Minnesota Statutes, or by the county attorney upon approval of the county board under Section 388.10 of Minnesota Statutes, or by the district court on motion under Section 388.12 of Minnesota Statutes. Since the attorney general's office was not involved in the prosecution before the district court, Section 8.01 of Minnesota Statutes is inapplicable to this case.

It should be noted that particulars of prejudicial error were pleaded by your petitioner and not denied by the State. Thus, harmless error is not a question here.

In the district court, the State pleaded that Mme Connors and Mr. Lennon, though assistants of Amy Klobuchar, Hennepin County Attorney, were authorized by law to prosecute the petitioner, because they were appointed as special assistants by Doug Johnson, Washington County Attorney, acting on his own authority, as supposedly allowed by what the State claimed was a "joint powers agreement" under Section 471.59 of Minnesota Statutes. The agreement was pleaded verbatim: the agreement, however, actually is certain "project safety" agreement signed five years ago by several county attorneys, but it is not approved by county boards, so it is not a joint powers agreement at all. In any event, "project safety" agreement is limited to firearms cases, nor does it purport to allow one county attorney to appoint the assistants of another county attorney as his own special assistants. See pages A14-A16 of the petitioner's appendix.

When it became evident on appeal that the "project safety" agreement was not a good plea against the petition in the district court, the State attempted to argue for the first time on appeal that the appointments of Mme. Lennon and Mr. Connors were allowed by a certain joint powers agreement concluded among several county boards thirty-five years ago. While article 7 of this joint powers agreement ostensibly authorizes a certain inter-county board, upon recommendation of its general counsel, to appoint special assistant county attorneys, no such procedure, assuming without conceding it to be valid, was followed in the purported appointment of Mme. Lennon and Mr. Connors as special assistant county attorneys in this case. See pages Al2-A13 and A23 of the petitioner's appendix.

The petitioner made a motion to, strike this new material, on grounds that such material was not pleaded in the district court, and so could not be pleaded for the first time on appeal. See the third motion on pages A28-A29 of the petitioner's appendix, based principally on *Thiele v. Stich*, 425

N. W. 2d 580 at 582 (Minn. 1988). Your petitioner will not argue that point here as cause to grant review, but reserves the right to argue the issue if review is granted.

In any event, it was obvious that neither the "project safety" agreement nor the joint powers agreement could justify the appointment of Mme. Lennon and Mr. Conners, so the State fell back on *State v. Knaffla*, 243 N. W. 2d at 737 at 741 (Minn. 1976), --i. e., the State claimed that, during the original prosecution, the petitioner could have challenged the appointments of these lawyers as special assistant county attorneys in Washington County, but failed to do so, and thus so may not raise the issue for the first time in proceedings for post-conviction civil relief. The petitioner answered the State's resort to the *Knaffla* doctrine in two ways.

The first in reference to equitable estoppel See *Northern Petrochemical Co. v. U. S. Fire Ins. Co.*, 277 N. W. 2d 408 at 410 (Minn.1979), and *State v. Ramirez*, 597 N. W. 2d 575 at 577- 578 (Minn. App. 1999). Your petitioner will not argue that point here as cause to grant review, but reserves the right to press it if review is granted.

The petitioner also claimed that unlawful appointment of counsel for the State is one of those defenses which **cannot be waived** and so may always be raised for the first time in proceedings for post-conviction civil relief. See *State v. Johnson*, 653 N. W. 2d at 650-651, citing and relying on *State v. White*, 219 N. W. 2d at 93. And on **this point alone**, the whole fate of this cause turns. The court of appeals disposed of this latter point in the following language of its unpublished opinion, reproduced on pages A35-A36 of the petitioner's appendix:

> "Appellant also contends that the issuance of a complaint by a county attorney who was not properly appointed is a jurisdictional defect that cannot be

waived and is thus not barred by *Knaffla*. But the supreme court has concluded that this is no more than a technical defect that can be waived by the failure to raise the issue in the trial court. *State v. Abbott*, 356 N. W. 2d 677 at 679 (Minn. 1984). Appellant was prosecuted by attorneys acting on behalf of the prosecutorial authority for the jurisdiction where the crime occurred. Therefore, there was no jurisdictional defect. Cf. *State v. Persons*, 528 N. W. 2d 278 at 280 (Minn. App. 1995)."

**Why Review Should Be Granted**

This Court should grant review, because **the court of appeals decided this case in direct conflict with the very judicial decisions of appellate courts in Minnesota on which it relied**.

The court of appeals first cited *Abbott*, 356 N. W. 2d at 679, where it was said,

> "Defendant argues first that he was denied due process because the attorney who prosecuted him was not properly appointed as assistant county attorney. Defendant apparently did not raise the issue in the trial court. He has not cited any authority that would require vacation of his conviction on that basis. We hold that, even if the prosecutor's appointment was technically defective, the defect did not prejudice defendant or deprive him of a fair trial. *Wingfield v. State*, 205 P. 2d 320 (Okla. Cr. 1949), overruled on other grounds, *Homer v. State*, 657 P. 2d 172 (Okla. Cr. App. 1983)."

In *Abbott*, this Court did not "conclude" that unlawful appointment of a lawyer as a public prosecutor is a "mere technical defect that can be waived." This Court avoided that question, and held that prejudice must be shown before the

point can be raised. In this case, prejudice to the petitioner has been expressly pleaded and not denied and thus admitted on the face of the pleadings. See pages A6-A11 of the petitioner's appendix.

More important, Judge Crippen must have known that *Abbott* had not been understood by his own court as he characterized it, -- i. e., as holding that such unlawful appointment is a "mere technical defect that can be waived." For Judge Crippen expressly cited and relied upon *State v. Persons*, 528 N. W. 2d at 280, where the **Minnesota Court of Appeals** said in a binding and published opinion too plain to be misunderstood,

> "**A prosecutor may not legally act beyond the authority conferred by the legislature on his or her office.** *State v. House*, 192 N. W. 2d 93 at 95 (Minn. 1971). The prosecution here was initiated by the wrong prosecuting authority. Because the prosecutor for St. Joseph lacked authority to prosecute, the attempt to prosecute Persons **became a nullity**. Because the wrong prosecuting authority signed the complaint, we conclude that there is a violation of statutory authority **which the defendant cannot waive**." [Emphasis added]

It should be remembered no less that, as listed on the cover of the State's own submissions in the court of appeals and as will likewise appear from their submission before this Court in answer to this petition for review, the State has been represented in these proceedings for post-conviction civil relief, not by Doug Johnson, Washington County Attorney, but Amy Klobuchar, Hennepin County Attorney. Mme. Klobuchar, not Mr. Johnson, is now and always has been in charge of this case from the day the original complaint was first signed, as is evident from the face of the pleadings in this case. Again see pages A6-A11 of the petitioner's appendix.

It should be added further that the authority of *State v. Persons*, 528 N. W. 2d at 280, rests squarely and securely on the authority of the **Minnesota Supreme Court** in *State v. House*, 326 N. W. 2d at 95, which also speaks in language impossible to misunderstand:

> "That statute says that the county attorney shall represent the county in all cases in which the county is a party, advise county officers, and handle all criminal matters within the county. No authority is given for the county attorney to deal with civil cases in which the State, rather than the county, is a party. The attorney general ... is empowered to act as the attorney for all state officers, boards, and commissions and that includes the department of public safety. When requested by the attorney general, the county attorney shall act in behalf of such officials ... But no request was made here, and, consequently, **no authority** was given to the county attorney to drop the implied-consent charge in behalf of the department of public safety." [Emphasis added]
>
> And the syllabus of this Court in House, 192 N. W. 2d at 94 removes any doubt:
>
> "Without express authorization, the county attorney does not have the authority to act in behalf of the commissioner of public safety in such proceedings, and any agreement by the county attorney to waive to dismiss such proceedings is **without force and effect**." [Emphasis added]

The practical question, therefore, is whether the petitioner should be given the benefit of the established law of this State, or Mme. Klochuchar[sic] should be allowed to save face as she seeks a seat in the United States Senate. There is only one civilized answer to this question. Review should

forthwith be granted. This petition is

Respectfully submitted,

Date June 30, 2002

s/

JOHN REMINGTON GRAHAM (#3664X)
180 Haut de la Paroisse
St-Agapit, Comté de Lotbinière
Québec GOS 1Z0 Canada
Telephone 418-888-5049

Counsel for the petitioner

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2004).*

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A04-2157**

Rodney Allen Mattmiller,
petitioner,
Appellant,
vs.
State of Minnesota,
Respondent.

**Filed June 14, 2005**
**Affirmed; motion denied**
**Crippen, Judge***

Washington County District Court
File No. K0-02-2092

John Remington Graham, 180 Haut de la Paroisse, St-Agapit, Comté de Lotbinière, Quebec G0S 1Z0 Canada (for appellant)

Mike Hatch, Attorney General, 1800 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Amy Klobuchar, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Willis, Presiding Judge, Shumaker, Judge, and Crippen, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**CRIPPEN**, Judge

Appellant Rodney Mattmiller appeals from the postconviction court's order denying his petition for relief; arguing that the special assistant county attorneys who prosecuted him were not properly appointed. Because appellant failed to raise this issue on direct appeal, he is barred from challenging the prosecutorial appointments in a postconviction proceeding. We therefore affirm.

## FACTS

In December 2002 appellant was convicted after a jury trial of eight counts of tax evasion, filing false or fraudulent returns, and failure to pay motor vehicle taxes. Appellant was tried in Washington County, the location of his residence. The Washington County attorney appointed assistant Hennepin County attorneys to prosecute appellant as special assistant county attorneys. The county attorney apparently relied on a joint power-sharing agreement entered into in 1970 among eight metropolitan area counties, including Washington and Hennepin counties, but neither the agreement nor the appointments were made a part of the trial record.

Appellant was sentenced in March 2003 on one count of tax evasion, one count of failure to pay motor vehicle taxes, and three counts of filing a false or fraudulent return. He filed a direct appeal, alleging evidentiary errors, insufficient evidence, preemption by federal law, constitutional defects, and error in failing to hold a *Schwartz* hearing. We affirmed appellant's convictions in a 2004 unpublished opinion, and the supreme court denied appellant's petition for review.

In September 2004, appellant filed a postconviction petition alleging that the prosecutors were without legal

authority to act on behalf of Washington County. The district court refused appellant's request for an evidentiary hearing and issued its order denying postconviction relief in October 2004. The order stated that the role of the assistant Hennepin County attorneys during prosecution of the case was "no secret" and that appellant's arguments should have been raised at the time of his direct appeal.

**DECISION**

A petition for postconviction relief is a collateral attack on a conviction that carries a presumption of regularity. *Boitnott v. State*, 631 N.W.2d 362, 368 (Mimi. 2001). On review, the appellate court determines whether there is sufficient evidence to sustain the district court's findings. *Id.* The district court's order will not be reversed absent an abuse of discretion. *Id.*

The postconviction court need not consider matters that were raised or that were known but not raised at the time of the direct appeal. *State v. Johnson*, 653 N.W.2d 646, 649 (Minn. App. 2002) (citing *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976)). The exceptions to the *Knaffla* rule include (1) claims that are so novel that the legal basis for them was not available on direct appeal; or (2) claims that the petitioner did not deliberately and inexcusably fail to raise on the direct appeal. *Johnson*, 652 N.W.2d at 650. The postconviction court may also entertain claims that are barred by the *Knaffla* rule in the interest of justice. *Boitnott*, 631 N.W.2d at 369-70.

As the district court stated in its findings, it was no secret that the prosecuting attorneys were from Hennepin County. And a claim of unauthorized appointment as an assistant county attorney is not a novel claim. *See State v. Abbott*, 356 N.W.2d 677, 679 (Minn. 1984) (refusing to vacate defendant's conviction based on technically defective appointment of prosecutor).

Appellant argues that the state should be equitably estopped from raising a *Knaffla* bar because he believed their representations that the appointment was proper. A wronged party may plead equitable estoppel against the government where he or she has relied in good faith on government representations, to his or her detriment. *State v. Ramirez*, 597 N.W.2d 575, 577 (Minn. App. 1999). Generally, this estoppel requires wrongful government conduct, which is understood to mean affirmative misconduct. *Id.* at 578. Appellant has the burden of establishing that equitable estoppel applies. *Id.* We find no evidence of affirmative misconduct in the record before us that would support appellant's allegations.

Appellant also contends that the issuance of a complaint by a county attorney who was not properly appointed is a jurisdictional defect that cannot be waived and thus is not barred by *Knaffla*. But the supreme court has concluded that this is no more than a technical defect that can be waived by the failure to raise the issue in the trial court. *Abbott*, 356 N.W.2d at 679. And because appellant was prosecuted by attorneys acting on behalf of the prosecutorial authority for the jurisdiction where the crime occurred, there was no jurisdictional defect. *Cf. State v. Persons*, 528 N.W.2d 278, 280 (Minn. App. 1995) (holding complaint must be prosecuted by prosecuting authority authorized to prosecute the offense).

Based on the evidence in the record, the district court did not abuse its discretion by denying appellant's petition for postconviction relief. In light of our decision, we deny appellant's motion to strike respondent's brief and parts of its appendix.

**Affirmed; motion denied.**

s/

Gary Crippen

County Auditors Office
St. Paul, Minn.

File No. 2068
Resolution No. 9-93
April 6, 1970

The attention of Counties of Anoka, Carver, Dakota, Hennepin, Ramsey, St. Louis, Scott and Washington; County Attorney; County Auditor

is respectfully called to the following Resolution of the Board of County Commissioners of Ramsey County, Minnesota, adopted at the meeting held on April 6, 1970

By Commissioner Nadeau

WHEREAS the incidence of crime in the Urban Areas of Minnesota has increased remarkably during the past few years, and

WHEREAS the nature of the population, and the industrial, commercial and residential character of the metropolitan area has changed to unify the once diverse elements of the community, and

WHEREAS the counties and the office of county attorney of the various counties in the metropolitan area are charged by the people with the duty to detect, suppress and prosecute crime, and

WHEREAS the people and the county boards of the various counties desire that persons accused of crime and held for trial be dealt with in a speedy, fair, just manner in accordance with due process of law and that all constitutional safeguards as to liberty and property be guaranteed, and

WHEREAS proper law enforcement and prosecution of crime requires a close cooperation and blending of those public facilities available to the several county attorneys in the metropolitan area, and

WHEREAS the United States and the State of Minnesota have enacted legislation relating to the matter of criminal proceedings; providing for funds and other assistance to law enforcement agencies, and

WHEREAS the county boards of the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, St. Louis, Scott and Washington desire to participate with the other governmental agencies interested in the enforcement of the criminal law, and

WHEREAS the Attorney General of Minnesota is charged with the responsibility for providing leadership and direction to coordinated efforts at law enforcement and desires to participate in such activity by active leadership and support of such programs, and

WHEREAS the several county attorneys of the above counties and the Attorney General of the State of Minnesota have acted to recommend the adoption and enactment of a joint powers agreement providing for mutual aid, cooperation and joint use of facilities and personnel and the establishment of an office and board known as Minnesota Urban County Attorneys' Board to effect such action;

NOW THEREFORE, BE IT RESOLVED that the Joint Powers Agreement be approved and the proper county officials are directed to execute it and to perform all necessary acts to implement and to execute said agreement.

OFFICE OF COUNTY AUDITOR )
) SS
RAMSEY COUNTY, MINNESOTA)

I, J. D. Swan, duly appointed and qualified Deputy County Auditor in and for Ramsey County, Minnesota, do hereby certify that the foregoing copy is a true and correct transcript of a resolution adopted by the Board of Ramsey County Commissioners on April 6, 1970

Dated at St. Paul, Minnesota this April 6, 1970

s/ _____
J. D. Swan
Deputy County Auditor

## JOINT POWERS AGREEMENT

The counties of Anoka, Carver, Dakota, Hennepin, Ramsey, St. Louis, Scott and Washington, State of Minnesota, each acting by and through its Board of County Commissioners, and the office of the State Attorney General acting by Douglas Head, pursuant to the provisions of MS 471.59 do hereby agree as follows:

1. A joint agency is hereby established to be known as the Minnesota Urban County Attorneys' Board. It is comprised, ex officio, of the County Attorney of each participating county, and the Attorney General of the State of Minnesota.

2. As soon as practicable the Board shall meet at the call of the Attorney General, who shall act as temporary chairman and organize the first meeting. At this meeting the Board shall elect a permanent chairman and adopt rules for the regulation of its business.

3. The Board may appoint a general counsel, who shall serve at the pleasure of the Board, and may set the terms and conditions of his employment. The Board also may employ such other employees as it may determine and spend such funds as may as may lawfully be appropriated to it by the parties hereto for purposes of this agreement. The Board shall set the compensation and may pay reasonable and necessary expenses of its employees.

4. The Board is hereby designated as the agent of the parties hereto for the purpose of making application for federal and state grants-in-aid for purposes related to the prosecution of crime, and the agent for purposes of entering into contracts with other governments relating thereto.

5. Acting through the office of its general counsel the Board shall provide legal aid, counsel and assistance to the office of County Attorney in each of the parties hereto in matter

relating to criminal proceedings. Such assistance shall be provided and conducted under the direct supervision and control of the general counsel in accordance with rules and regulations relating thereto adopted by the Board. The Board shall provide for the conduct of meetings, seminars, schools and other projects related to the purpose of coordinating and improving the efficiency and effectiveness of the office of Urban County Attorney. It shall make such reasonable efforts to provide reference, technical assistance, informational and other coordinative services for local prosecutorial units within the criminal justice system as may be necessary. The Board may abstract and disseminate court decisions of special significance to prosecutors; identify and distribute training materials and current literature; coordinate professional meetings, panels, workshops and seminars for prosecutors; issue guidelines, manuals or handbooks re prosecutive policies, practices, discretionary standards, etc. promulgated by duly constituted authority or suggested by State prosecutor organizations or councils, and undertake limited reference, research, and inquiry services for prosecutive offices which have inadequate manpower and resources for this purpose.

6. The Board may provide a crime intelligence service to the County Attorneys involved. It may provide for the collecting of data on crime and criminals; the central analyzing of such information and the dissemination of information to the participating County Attorneys. For this purpose it may cooperate with any law enforcement agency as the Board may determine. It may establish such communications and record keeping services as it may deem of assistance to the county attorneys in the advancement of the criminal justice system.

7. The Board upon recommendation of the general counsel has power to appoint any person licensed to practice law in Minnesota as a special assistant county attorney for each of the counties party hereto. The pay and allowances of such persons to be established by the Board and to be paid from

funds available and appropriated to the Board by lawful authority.

8. The Board has power to provide necessary office space, equipment, and the usual supplies necessary to the accomplishment of its duties. It shall be governed by laws relating to purchases and contracts by counties generally.

9. Members of the Board shall serve without compensation, but shall be reimbursed for their necessary expenses from funds available to the Board.

10. The operations of the Board and the office of its general counsel shall be financed by an annual appropriation from each of the parties hereto, and by such grants-in-aid as may be made for the purpose by the United States or the State of Minnesota or any other private or public person or corporation. The Board is authorized to solicit, receive and expend gifts of property from any source for its lawful purposes. The annual appropriation to the Board or any part thereof may be used by it to match any grant-in-aid contract with the federal or state government or any private or public person or corporation.

11. The Board is directed to prepare a proposed budget for its operations during 1971 and to submit this to each of the parties hereto on or before October 10, 1970 for consideration. If adopted, the parties hereto agree to appropriate sufficient funds to finance the operations of the Board on the basis of population differential as determined and recommended by the Board.

12. Payment of all money accruing to the Board or its agents shall be made to the Ramsey County Treasure through the Ramsey County Auditor. These officials shall account for these funds as public money in accordance with law. They shall be paid out by auditors warrant in the usual manner only upon vouchers of the general counsel. The Board shall

prescribe rules for the accurate accounting of its funds which shall be maintained by the general counsel. The books of the Board may be audited at any time by any of the parties hereto or by the Public Examiner in accordance with law. The Board shall make an annual public account of its funds and furnish a report thereof to each of the parties hereto in connection with its proposed budget for the ensuing year. The Board shall secure a reasonable bond on all its employees except members of the Bar, in an amount as determined by the Board.

13. Employees of the Board shall be deemed to be public employees for all purposes and subject to all laws relating thereto; the Board may provide for insurance for Workman's Compensation and such Health and Welfare provisions as are provided for Civil Service of Ramsey County. This provision does not apple to members of the Bar retained by the Board on a part time or fee paid basis.

14. The Board is authorized to negotiate with the United States or the State of Minnesota or any private or public person or corporation in an attempt to secure funds for its operations under this agreement. It is authorized to expend such funds in accordance with this agreement. The Board may not commit the parties hereto to the expenditure of any funds not appropriated to it pursuant to this agreement; however, it is the intention of the parties hereto to participate fully with the United States and the State of Minnesota in the execution of the Omnibus Crime Control and Safe Streets Act of 1968 and similar legislation, and the Board is encouraged to prepare and to submit proposals requiring matching funds to implement this agreement. If immediate funds are deemed necessary by the Board for action during 1970, a proposal outlining the requirement in detail should be prepared by the Board and submitted to the parties hereto for consideration and action.

15. The County Attorney of each of the counties party hereto or any assistant county attorney, under the direction of his department head, may donate such time to the work of the Board as may be deemed necessary by the County Attorney involved. Each County Attorney is authorized to use such public facilities as may be available to him for purposes of the Board.

16. The Attorney General of the State of Minnesota agrees to furnish such assistance to the Board as may be deemed proper by him upon request of the Board. The office of the State Attorney General will provide such facilities, reference, technical assistance and coordinative leadership and services as the Board and the Attorney General shall determine. The Attorney General shall be a member of the Board with full voting rights, duties and privileges.

17. This agreement may be terminated as to any one of the parties hereto upon sixty (60) days written notice to the office of the General Counsel that a party has, by resolution duly adopted, elected to terminate. Upon such notice the Board shall determine any division of property to be made in the matter and its distribution shall be final and binding upon all parties hereto. This agreement is binding upon the parties and, except as above, may be terminated only by a unanimous vote of the Board.

STATE OF MINNESOTA
DISTRICT COURT

COUNTY OF WASHINGTON
TENTH JUDICIAL DISTRICT

State of Minnesota

PLAINTIFF,

**ORDER**

vs.

Court File No. K0-02-2092

Rodney Alan Mattmiller,

DEFENDANT.

---

The above-captioned matter came before the Court pursuant to the Petition of the Defendant for Post-Conviction Relief.

Ms. Caroline H Lennon, Esq, represents plaintiff.

Mr. John Remington Graham, Esq., represents defendant.

NOW THEREFORE, based upon all of the files, record, and proceedings herein, the Court makes the following

## FINDINGS OF FACT

1. That the Defendant moves for Post. Conviction relief regarding the conviction he received. The Honorable Mary Carlson, Judge of District Court on March 11, 2003, sentenced defendant.

2. Defendant appealed his conviction. The Minnesota Court of Appeals affirmed the conviction.

3. Defendant attempted to appeal the decision of the Minnesota Court of Appeals. The Minnesota Supreme Court declined to review the matter.

4. Defendants' argument is that the attorneys who prosecuted his case, Mr. Peter Connors and Ms. Caroline Lennon, are employed as Assistant Hennepin County Attorneys and are therefore without legal authority to prosecute this Washington County offense without approval of the Washington County Board of Commissioners or the District Court.

5. The State of Minnesota filed an Answer opposing the Defendant's request.

6. The State's response includes copies of documents showing that Mr. Connors and Ms. Lennon were duly authorized to prosecute this case pursuant to a Joint Powers agreement (called a "Memorandum of Understanding") between and among nine (9) Minnesota counties. See Appendix B to the State's response.

7. That Mr. Connors and Ms. Lennon were each individually and specifically appointed by Washington County Attorney Doug Johnson on February 4, 2002 to prosecute the case against the Defendant. The argument made by the Defendant should have been raised at the time of his direct appeal. There was no secret, during the prosecution of the case that Mr. Connors and Ms. Lennon were from the Hennepin County Attorney's Office. All claims known at the time of the direct appeal should have been included in that appeal.

NOW THEREFORE, based upon the foregoing Findings of Fact, the Court makes the following

## CONCLUSIONS & ORDER

1. In consideration of the totality of the circumstances of this case and of the allegation contained in the Petition, the court concludes that there is no material issue of fact in this matter. The files, records, and proceedings herein show

conclusively that the Petitioner is entitled to no relief.

2. The Defendant is not entitled to Post-Conviction relief as requested and his Petition is denied and dismissed.

3. The Court Administrator of the Washington County District Court shall mail a copy of this Order to counsel for each of the parties hereto.

IT IS SO ORDERED.

Dated: October 6, 2004

s/
Gregory G. Galler
Judge of District Court

**STATE OF MINNESOTA**
**COUNTY OF WASHINGTON**

**DISTRICT COURT**
**TENTH JUDICIAL DISTRICT**

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State of Minnesota,
Plantiff,

**STATE'S ANSWER TO PETITION FOR POST-CONVICTION CIVIL RELIEF**

vs.

Case No: K0-02-002092
C.A. No.

Rodney Alan Mattmiller,

Defendant.

---

TO: THE COURT AND COUNSEL FOR THE ABOVE-NAMED DEFENDANT

## FACTS

Defendant Rodney Mattmiller was convicted of filing fraudulent Minnesota tax returns and willful tax evasion for tax years 1998, 1999, and 2000. He was also convicted of failing to pay Minnesota's motor vehicle sales tax for tax year 1999. The trial court sentenced Defendant on March 6, 2003, on the three counts of filing fraudulent returns. The willful evasion counts were merged under Minn. Stat. § 609.035. Defendant was also sentenced on his sales tax conviction. The trial court used the *Hernandez* method and imposed four concurrent probationary sentences.

## ARGUMENT

### CAROLINE LENNON AND PETE CONNORS WERE AUTHORIZED UNDER MINNESOTA LAW TO PROSECUTE DEFENDANT.

Defendant requests that his sentence be vacated, set

aside, expunged, and held for naught because, despite his "diligent search," he was unable to locate documents relating to the special appointment of Caroline Lennon and Pete Connors as Special Assistant Washington County Attorneys. The Defendant maintains that the convictions and sentences he received for crimes he committed are invalid and overly harsh because he was not prosecuted by the duly elected Washington County Attorney, or someone duly authorized by law to prosecute in behalf of his office under his supervision and control under sections 388.09, 388.10, or 388.12.

Despite Defendant's "diligent search," documents do exist relating to the swearing in and appointment of Caroline Lennon and Pete Connors as Special Assistant Washington County Attorneys by Washington County Attorney Doug Johnson. *See* Appendix A. This special appointment was made pursuant to Mimi. Stat. §§ 388.051 and 471.59. Note 4 of § 388.051 states:

> Two or more counties may, with the consent of the county attorneys involved, enter into a joint agreement under section 471.59 whereby certain legal services could be furnished by one county to another to assist the county attorney in carrying out the duties imposed upon him by statute.

Subdivision 1 of § 471.59 provides in pertinent part that:

> Two or more governmental units, by agreement entered into through action of their governing bodies, may jointly or cooperatively exercise any power common to the contracting parties or any similar powers, including those which are the same except for territorial limits within which they may be exercised. The agreement may provide for the exercise of such powers by one or more of the participating governmental units on behalf of the other participating units.

Such an agreement was entered into on January 28, 2000, whereby Urban County Attorneys (consisting of County Attorneys in Anoka, Carver, Dakota, Hennepin, Olmsted, Ramsey, St. Louis, Scott and Washington counties) agreed to the mutual exchange of prosecutorial and civil counsel services. *See* Appendix B.

Therefore, Defendant's request for post-conviction relief should be denied because Caroline Lennon and Pete Connors were properly appointed and sworn in by the Washington County Attorney pursuant to Minn. Stat. §§ 388.051 and 471.59.

**DEFENDANT'S REQUEST FOR POST-CONVICTION RELIEF SHOULD BE DENIED BECAUSE IT WAS NOT PREVIOSLY RAISED ON APPEAL AND DOES NOT INVOLVE A MATTER OF JURISDICTION.**

Where a petition for post-conviction relief otherwise meets the standards set forth in the Minnesota Statutes Chapter 590, it may be procedurally barred due to the standard set forth by .the Minnesota Supreme Court in *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976). "[W]here direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be-considered upon a subsequent petition for post-conviction relief." *Id* at 741. This rule also applies if the Defendant should have known about the claim at the time of direct appeal. *Boinott v. State*, 640 N.W.2d 626, 630 (Minn. 2002)(citing *Black v. State*, 560 N.W.2d 83, 85 (Minn. 1997)).

In this case, the Defendant was award during his trial and at the time of his appeal that he was being prosecuted by Assistant Hennepin County Attorneys, specially appointed to represent Washington County. Because Defendant did not raise this issue on appeal, he is now barred from doing so pursuant to the Minnesota Supreme Court's holding in *Knaffla*

and *Boinott*.

Additionally, it is important to note that Defendant's request for post-conviction relief does not involve a matter of jurisdiction. Prosecutorial jurisdiction lies in the state of Minnesota, where Defendant was charged and prosecuted.

Therefore, Defendant's request for post-conviction relief should be denied because it does not involve an issue of jurisdiction. Furthermore, Defendant knew of the matter now before the court at the time of his appeal and he failed to raise it.

## CONCLUSION

Defendant's request for post conviction relief should be denied. Defendant was properly prosecuted by Caroline Lennon and Pete Connors who were appointed and sworn in by the Washington County Attorney as Special Assistant Washington County Attorneys pursuant Minn. Stat. §§ 388.051 and 471.59. Additionally; consideration of this issue is procedurally barred because it does not involve a question of jurisdiction and Defendant knew of the matter at the time of his appeal and failed to raise it.

Respectfully submitted,

AMY KLOBUCHAR
Hennepin County Attorney

By: s/_____
Caroline Lennon (#203051)
Assistant County Attorney
C2000 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-6034
FAX: (612) 348-3061

Dated: 9-27-04

## SPECIAL APPOINTMENT

KNOW ALL MEN, that I, Doug Johnson, County Attorney of Washington County, Minnesota, do hereby, constitute and appoint Caroline Lennon of Hennepin County as Special Assistant Washington County Attorney, with full power until this appointment shall be revoked, to perform in the manner provided by law, all duties pertaining to said office, effective immediately, and to continue upon acceptance below for the duration of the prosecution of State of Minnesota v. Dennis Dickinson and State of Minnesota v. Rodney Mattmiller.

Witness my hand and seal this 4th day of February, 2002, A.D.

s/_____
Doug Johnson
County Attorney
Washington County, Minnesota

STATE OF MINNESOTA )
)ss
COUNTY OF HENNEPIN )

I do solemnly swear that I will support the Constitution of the United States, the Constitution of the State of Minnesota, and faithfully discharge the duties of the office of Special Assistant County Attorney of Washington County, Minnesota, to the best of my judgment and ability, so help me God.

s/_____
CAROLINE LENNON #203051

Subscribed and sworn to before me
this 14th day of February, 2002.

s/_____
Notary Public

## SPECIAL APPOINTMENT

KNOW ALL MEN, that I, Doug Johnson, County Attorney of Washington County, Minnesota, do hereby constitute and appoint PETE CONNORS of Hennepin County as Special Assistant Washington County Attorney, with full power until this appointment shall be revoked, to perform in the manner provided by law, all duties pertaining to said office, effective immediately, and to continue upon acceptance below for the duration of the prosecution of State of Minnesota v. Dennis Dickinson and State of Minnesota v. Rodney Mattmiller.

Witness my hand and seal this 4th day of February, 2002, A.D.

s/_____
Doug Johnson
County Attorney
Washington County, Minnesota

STATE OF MINNESOTA )
)ss
COUNTY OF HENNEPIN )

I do solemnly swear that I will support the Constitution of the United States, the Constitution of the State of Minnesota, and faithfully discharge the duties of the office of Special Assistant County Attorney of Washington County, Minnesota, to the best of my judgment and ability, so help me God.

s/_____
PETE CONNORS #20018545

Subscribed and sworn to before me
this 14th day of February, 2002.

s/_____
Notary Public

# PROJECT SAFETY ON
# MEMORANDUM OF UNDERSTANDING

Between the United States Attorney's Office
District of Minnesota
and
Anoka County Attorney's Office
Dakota County Attorney's Office
Hennepin County Attorney's Office
Ramsey County Attorney's Office
Washington County Attorney's Office

This memorandum sets forth the agreement concerning PROJECT SAFETY ON between the United States Attorney's Office for the District Of Minnesota and the County Attorney's Offices for Anoka County, Dakota County, Hennepin County, Ramsey County and Washington County.

The goal of PROJECT SAFETY ON is the reduction of the violence that results from the illegal use of firearms by criminals. There are four components to this initiative. The components of PROJECT SAFETY ON are: (1) Prosecution; (2) Training; (3) Education; and (4) Public Outreach.

## Prosecution

The United States Attorney's Office for the District of Minnesota and the Offices of the County Attorney for the Signatory Minnesota Counties have agreed to a collaborative prosecution strategy that will ensure that every firearms case within their respective jurisdictions will be reviewed based on a joint set of prosecutorial criteria. Based on that review a determination will be made as to which jurisdiction can most effectively prosecute each case and achieve the best overall enforcement of the firearms laws of the State of Minnesota and the United States.

The signatory County Attorneys and the United States

Attorney for the District of Minnesota agree that each will appoint a Point of Contact (POC) who will serve as the person within their office to be contacted with regard to gun prosecutions. Each office will have a designated backup to the POC in the circumstances that the POC is unavailable.

The POC in the County Attorney's Offices will review firearms cases within each county and bring cases that appear to warrant federal prosecution to the attention of the federal POC.

The United States Attorney's Office will expeditiously review each firearms case that is presented and will consult with the POC for the County Attorney concerning potential federal prosecution of the case. Notice of firearms cases between the United States Attorney's Office and the County Attorney's Offices will be effected by the use of a standard PROJECT SAFETY ON form. (Attachment A)

Training

The signatory County Attorneys and the United States Attorney for the District of Minnesota agree that they will participate in joint training of law enforcement personnel and federal and state prosecutors concerning state and federal firearms statutes.

The United States Attorney's Office will continue to support the "Guns First" training that was provided in September 1999 to local law enforcement seeking to train police officers about the firearms statutes, the investigative and information services available from federal law enforcement and the importance of gathering and sharing information that will assist in the interdiction of illicit firearms use. Further, it is agreed that enhanced training will include education on the relationship of firearms laws to other federal statutes, such as the Violence Against Women Act (VAWA).

## Education

The signatory County Attorneys and the United States Attorney for the District of Minnesota agree that they will participate in a joint public education program. The program will include a Minneapolis/St. Paul area and statewide promotional initiative in conjunction with the Minnesota institute of Public Health's program "Stop Gun Injuries & Death". This education program will include the distribution to schools, parent organizations, student councils, and youth organizations statewide, of materials on the importance of gun safety and non-violence. This educational process will also include full participation in the Student Pledge Against Gun Violence during 2000, in collaboration with Minnesota HEALS.

## Public Outreach

The signatory County Attorneys and the United States Attorney for the District of Minnesota agree that they will participate in a joint public outreach program by means of a media campaign to raise awareness of methods to reduce gun violence, including, safe gun storage, keeping guns out of the hands of children, and aggressive prosecution. This program includes full cooperation with non-profit and public service entities such as Minnesota HEALS and the Minnesota Institute of Public Health. The United States Attorney for the District of Minnesota will establish a toll-free statewide telephone hotline which the public can use to report illegal firearms.

s/_____ January 28, 2000
B. TODD JONES Date
United States Attorney

s/_____ 24 January, 2000
ROBERT M.A. JOHNSON Date
Anoka County Attorney

s/ _____ January 28, 2000
JAMES C. BACKSTROM Date
Dakota County Attorney

s/ _____ January 28, 2000
SUSAN GAERTNER Date
Ramsey County Attorney

s/ _____ January 28, 2000
AMY KLOBUCHAR Date
Hennepin County Attorney

s/ _____ January 28, 2000
DOUGLAS JOHNSON Date
Washington County Attorney

**STATE OF MINNESOTA** **IN DISTRICT COURT**
**COUNTY OF WASHINGTON** **TENTH JUDICIAL DISTRICT**

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Rodney Alan Mattmiller,

Petitioner, PETITION FOR POST-CONVICTION CIVIL RELIEF

v. File # K0-02-2092

State of Minnesota,

Respondent

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TO THE JUDGES OF THE SAID COURT, GREETING

Comes now your petitioner, Rodney Alan Mattmiller, pursuant to the provisions of Chapter 590 of Minnesota Statutes, and he shows this honorable Court the following particulars, to wit:

1. In the case of State of Minnesota v. Rodney Alan Mattmiller, No. K0-02-2092 on the docket of the Washington County District Court, your petitioner was initially charged in an original complaint filed on March 28, 2002, and setting forth seven counts of felony, these accusing him of failure to pay certain taxes due to the State of Minnesota. Following proceedings thereon, the original complaint was displaced with an amended complaint filed on December 1, 2002, and setting forth twelve counts of felony, these accusing him of failure to pay certain taxes due to the State of Minnesota, whereupon he was further prosecuted. The acts complained of in the said original complaint and amended complaint took place in Washington County, State of Minnesota, and, therefore, under Article I, Section 6 of the Minnesota

Constitution, and Section 388.051, Subd. 1(c), of Minnesota Statutes your petitioner had to be prosecuted, if at all, in Washington County by the duly elected Washington County Attorney, or someone duly authorized by law to prosecute in behalf of his office under his supervision and control under Sections 388.09, 388.10, or 388.12 of Minnesota Statutes, or someone lawfully appointed by the Governor under Section 8.01 of Minnesota Statutes.

2. At no time material to things touched upon in this petition did the Governor appoint someone, nor could the Governor have intervened under Section 8.01 of Minnesota Statutes.

3. The said original criminal complaint was purportedly signed and authorized by one Peter Connor, posing and holding himself out as a special assistant county attorney in and for the said Washington County, which in fact and in law he was not as appears hereinafter with greater particularity. The said Peter Connor then and there acted for an in behalf of one Caroline Lennon, likewise posing and holding herself out as a special assistant county attorney in and for the said Washington County, which in fact and in law she was not as appears hereinafter with greater particularity.

4. The said amended criminal complaint was purportedly signed and authorized by Caroline Lennon, posing and holding herself out as a special assistant county attorney in and for the said Washington County, and in fact and in law she was not as appears hereinafter with greater particularity.

5. All the said proceedings against your petitioner upon the said original complaint and amended complaint, including all motions, the jury trial and verdict, and the sentencing, were jointly prosecuted ostensibly in behalf of the State of Minnesota by the said Peter Connors and Caroline Lennon, both of them at all times posing and holding

themselves out as special assistant county attorneys in and for the said Washington County, as in fact and in law neither of them ever was at any time material to things touched upon in this petition.

6. On December 12, 2002, your petitioner was found guilty, on seven counts of felony set forth in the said amended complaint, and acquitted on four counts of felony. The remaining count had meanwhile been dismissed, because barred by the statute of limitations.

7. On March 11, 2003, your petitioner was sentenced, and final judgment was entered against him in the said cause of State of Minnesota v. Rodney Alan Mattmiller, No. K0-02-2092 on the docket of the Washington County District Court. He was sentenced, subject to the pains • and penalties of a felony on six counts as still appears of public record, and on the remaining count imposition of sentence was stayed on certain conditions, whereupon he took an appeal noticed on March 15, 2003. He has served time imposed under incarceration, doing community service, and subject to probation, and he has paid all back taxes, interest, penalties imposed, so that now, of public record, he stands convicted on one count of misdemeanor, yet on six counts of felony. Because he stands convicted of public record upon six counts of felony, his career in the air force reserve and his career as a commercial airline pilot have been ruined, and he now has no means of livelihood in the field in which he has been professionally trained.

8. On June 8, 2004, the Minnesota Court of Appeals affirmed the conviction of your petitioner.

9. On August 19, 2004, the Minnesota Supreme Court declined further review of the cause.

10. Notwithstanding his conviction, your petitioner maintains his innocence of any wrongful intent not to pay

taxes due to the State of Minnesota, and believes, on the basis of legal considerations which remain controversial, that an Act of Congress preempts the field on determining tax liability of your petitioner as a commercial airline pilot, and that, under the said Act, your petitioner did not unlawfully evade taxes to the State of Minnesota. It is sufficient to say here that your petitioner was convicted on several counts of felony, without mens rea in any proper sense of the term, upon a legal technicality, and nothing more. However, neither the question of preemption, nor the question of mens rea, is raised by your petitioner in these proceedings for post-conviction civil relief.

11. At all times material to things touched upon in this petition, the said Peter Connors and Caroline Lennon were and have been members of the Minnesota Bar, assistant county attorneys in and for Hennepin County, and, as members of the Minnesota Bar, officers of the Washington County District Court, and, accordingly, your petitioner and his counsel reasonably relied upon the false representations and pretensions of the said Peter Connors and Caroline Lennon that they were duly authorized to appear as special assistant county attorneys in and for Washington County. The said Peter Connors, the said Caroline Lennon, and the respondent State of Minnesota are, therefore, all barred by equitable estoppel from claiming that the authority of the said Peter Connors and/or Caroline Connors to prosecute as aforesaid is procedurally barred in proceedings under Chapter 590 of Minnesota Statutes.

12. Your petitioner, through his undersigned counsel, has since undertaken a diligent search of the records of the Washington County Board of Commissioners, and he has discovered no resolution, motion, or other action appointing either the said Peter Connors or the said Caroline Lennon as aspecial assistant county attorney in and for Washington County in keeping with Section 388.09 or Section 388.10 of

Minnesota Statutes, either to prosecute your petitioner in the said cause of State of Minnesota v. Rodney Alan Mattmiller, No. K0-02-2092 on the docket of the Washington County District Court, or to prosecute him or any class of which he is a member in any cause then or since pending in the Washington County District Court. And your petitioner further alleges that neither the said Peter Conners nor the said Caroline Lennon ever was or has been so appointed as a special assistant county attorney in and for the said Washington County at any time material to things touched upon in this petition.

13. Your petitioner, through his undersigned counsel, has undertaken a diligent search of. the records of the Washington County District Court, and discovered no motion by or in behalf of the Washington County Attorney or any other person, upon cause shown, for appointment or approval of either the said Peter Connors or Caroline Lennon as special assistant county attorney in and for the said Washington County, nor has he discovered, either in the court file of the said cause of State of Minnesota v. Rodney Alan Mattmiller, No. KO-02-2092 on the docket of the Washington County District Court, or elsewhere in the office of the Washington County Court Administrator, any order of any Judge of the said Court, entered upon the minutes thereof and appointing either the said Peter Connors or Caroline Lennon under Section 388.12 of Minnesota Statutes as a special assistant county attorney in and for the said Washington County with authority to prosecute your petitioner, or any class of which your petitioner is a member. And your petitioner further alleges that neither the said Peter Conners nor Caroline Lennon ever was or has been so appointed or approved as a special assistant county attorney in and for the said Washington County at any time material to things touched upon in this petition.

14. Because neither the said Peter Connors nor the

said Caroline Lennon was lawfully appointed to act as a special assistant county attorney in and for the said Washington County to prosecute your petitioner at any time material to things touched upon in this petition, the entire proceedings against your petitioner, without regard to any other considerations, were and remain null and void as a matter of law. And, in any event, your petitioner does not raise a pure formality or technicality, for he has been substantially prejudiced by the irregularity of which he complains, in that the said Peter Connors and the said Caroline Lennon were in fact acting upon the directions, not of the Washington County Attorney, but of the Hennepin County Attorney whose policies with regard to the type of offenses with which your petitioner was charged are, for political reasons, more severe than those of the Washington County Attorney, and other county attorneys in the State of Minnesota. He was thus prejudiced in that, among other things, he was denied an opportunity to face civil proceedings and therein to settle and pay any taxes owed, or to plead guilty in criminal proceedings in exchange for very material and significant concessions which the Washington County Attorney or other county attorneys of the State of Minnesota have allowed in similar cases. As a practical consequence of this injustice, he was denied an opportunity to pay whatever he arguably owed to the State of Minnesota, then to carry on with his life unburdened by convictions of felony of public record, and thereby to save his professional career in the air force reserve and as a commercial airline pilot from permanent injury, as others similarly situated have or would have been permitted to do.

WHEREFORE, your petitioner prays for a judgment of this honorable Court declaring that his said sentence and conviction imposed on March 11, 2003, be in all things vacated, set aside, expunged, and held for naught, and granting such further or alternative post-conviction civil relief as will serve the interests of justice.

Dated: August 26, 2004

s/_____

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TEL-FAX 418-888-5049

Counsel for the petitioner